

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MARYLAND
3 NORTHERN DIVISION

4 STUDENTS FOR FAIR ADMISSIONS,)Trial Day 9
5)
6 Plaintiff,)
7)Civil No.
8 vs.)1:23-cv-2699-RDB
9 THE UNITED STATES NAVAL)Baltimore, Maryland
10 ACADEMY, ET AL.,)
11 Defendants.)September 26, 2024
12)10:03 a.m.
13)
14

15 TRIAL IN THE ABOVE-ENTITLED MATTER CONTINUED
16 BEFORE THE HONORABLE RICHARD D. BENNETT

17 A P P E A R A N C E S

18 On Behalf of the Plaintiff:

19 ADAM K. MORTARA, ESQUIRE
20 PATRICK STRAWBRIDGE, ESQUIRE
21 J. MICHAEL CONNOLLY, ESQUIRE
22 CAMERON T. NORRIS, ESQUIRE
23 JAMES HASSON, ESQUIRE
24 R. GABRIEL ANDERSON, ESQUIRE
25 THOMAS R. MCCARTHY, ESQUIRE
26 RACHAEL WYRICK, ESQUIRE

27 On Behalf of the Defendant:

28 JOSHUA E. GARDNER, ESQUIRE
29 CATHERINE M. YANG, ESQUIRE
30 ANDREW E. CARMICHAEL, ESQUIRE
31 JOHN ROBINSON, ESQUIRE
32 MEDHA GARGEYA, ESQUIRE
33 CHRIS E. MENDEZ, ESQUIRE

34 Also Present:

35 EDWARD BLUM, STUDENT FOR FAIR ADMISSIONS
36 BRUCE LATTA, NAVAL ACADEMY
37 TRACEY URBAN, PARALEGAL
38 LINDSEY O'CONNOR, PARALEGAL
39 MICHEAL PUSTERLA, IT
40 BRIAN SIMMONS, IT

41 Reported by:
42 Ronda J. Thomas, RMR, CRR

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1 (10:05 a.m.)

2 **THE COURT:** Good morning, everyone. You all may be
3 seated. I'm sorry for holding up for just a few minutes. We
4 had some things back in chambers we had to attend to before we
5 start. We're ready to proceed.

6 And with that, we will proceed with closing argument.

7 And, Mr. Strawbridge, we'll be delighted to hear from you.

8 **MR. STRAWBRIDGE:** Thank you, Your Honor. Let me just
9 start once again by thanking Ms. Herndon, Ms. Thomas, the
10 courthouse security officers, and the Court itself for the way
11 you treated us these past couple of weeks. We will remember
12 that for a long time.

13 I'll also thank the Justice Department lawyers who worked
14 both against us and also alongside us in this case. It's a
15 reminder that lawyers can try serious cases about serious
16 issues professionally and without the lawyers necessarily
17 taking themselves too seriously. And we appreciate that.

18 **THE COURT:** I think they're very apt comments,
19 Mr. Strawbridge, and when we finish, I have my own remarks to
20 make. It's been a delight to preside over this trial. I think
21 it's a real attribute to the legal profession. I started
22 looking at the time frame that we put on ourselves, and -- with
23 all due respect to my colleagues in North Carolina and
24 Massachusetts, I looked at the timeframe there, and we've
25 certainly had a more definite timeframe, I would say.

1 **MR. STRAWBRIDGE:** You put us to the grindstone, Your
2 Honor, and we appreciate it.

3 **THE COURT:** I think in all candor, it's because
4 there's serious public issues involved and it's serious issues
5 from both sides, and my view was I really wanted to try to put
6 this on a one-year track, and we got it done. And I hope I
7 didn't put too many people under too much pressure. And that
8 particularly is meant for all of the younger lawyers in the
9 case. Not to minimize the older lawyers on how much time we
10 spent, but the farther you go out, the more time was spent in
11 the second rows, not to mention the time of all of the various
12 parties.

13 Thank you, Mr. Strawbridge. And you may proceed.

14 **MR. STRAWBRIDGE:** Your Honor, it's no secret that we
15 have some deep legal disagreements with the defendants in this
16 case. They want deference for their decision to treat people
17 differently based on race in the Academy admissions process; we
18 don't think that has any place in an equal protection case.
19 They think the military may be able to use racial preferences
20 for as long as it wants; we think all racial classifications
21 must be temporary.

22 But there is one point of common ground, I believe, which
23 is that strict scrutiny applies and, at a minimum, the use of
24 race in the Naval Academy's admission process has to be
25 narrowly tailored.

1 Given that point of agreement, I'm going to focus most of
2 my presentation today on those issues as they came out in
3 trial. We will, obviously, present our full view of the record
4 and of the law in our written submissions next week.

5 Let's talk a little bit, just at the outset, about what
6 strict scrutiny and narrow tailoring requires. We saw some of
7 this slide in the opening argument. The government cannot
8 carry its burden if it doesn't quantify the actual extent of
9 the problem; it needs to offer more than assertion and
10 conjecture; and it does not win if the evidence is a draw or
11 the record is not clear.

12 Specifically with respect to narrow tailoring in the
13 racial classification content, the government needs to consider
14 whether lawful alternative or less restrictive means could have
15 been used.

16 Courts have to give intense scrutiny to whether a
17 nonracial approach or a more narrowly tailored racial
18 classification could promote the interest about as well at a
19 tolerable expense. That's from *Wygant*.

20 As we get into the case, I'm just going to talk a little
21 bit about what the actual evidence showed. And we're going to
22 go over six aspects of, I think, the Academy's admissions
23 process first.

24 Before I start, I think that the evidence in this case, I
25 will argue, showed that the Naval Academy does not know when it

1 started using race, it does not know when it will stop using
2 race, it does not know exactly how it's using race, it does not
3 know which students benefited from its use of race, it does not
4 know what would happen if it stopped using race, and it does
5 not even know exactly why it's using race. And I'll explain
6 the evidence as we go on each of these points.

7 Let's start at the beginning.

8 It is not disputed in this case that the Academy does not
9 know how it started using race. This, on the screen, is
10 Plaintiff's Exhibit 285, page 6. It's the interrogatory
11 response where we asked them to identify when they first began
12 using race. Their answer -- you can see it on the screen -- is
13 that they don't have any records identifying when race was
14 specifically included as a factor in the admissions process.

15 We know that it was decades ago and -- because they told
16 the Assistant Secretary of the Navy -- this is P138 -- that for
17 the last several decades, they had been using race as a factor
18 in its admissions process.

19 And, of course, Ms. Hwang, who worked in the admissions
20 office for more than a decade, testified that she had been
21 using race in admissions -- or the Academy had been using race
22 in admissions the entire time she had been there. And Dean
23 Latta testified that was also true for as long as he had been
24 in the admissions office.

25 The next problem that the Academy has that the evidence

1 demonstrates is that the Naval Academy does not know when it
2 will stop using race. You may recall that we asked Dean Latta
3 what was their end date for using racial preferences when he
4 arrived at the Academy more than 20 years ago.

5 His answer: "It hadn't really been discussed."

6 I said, "It hadn't been discussed?"

7 He said, "Right."

8 That is a somewhat shocking admission in and of itself.
9 Until a couple years ago, the Academy had never, apparently,
10 set any criteria for ending its use of race in the admissions
11 process. It was only after a legal review that it adopted the
12 current definition.

13 The Court is familiar with this -- we have heard evidence
14 on this throughout the case -- that the Academy is going to
15 stop using race once it both achieves and maintains the racial
16 and ethnic diversity of the Naval Academy student body at a
17 level comparable to the racial and ethnic diversity of the
18 general population.

19 Now, as far as an end point goes, Your Honor, that is not
20 much of one. The racial demographics of this country are
21 always changing. They aren't the same today as they were 10
22 years ago. They will not be the same five or ten years from
23 now. Moreover, we don't have any evidence -- we don't know --
24 what the Naval Academy considers the word "maintain" to
25 encompass. Does that mean they have to maintain the racial

1 diversity consistent with the general population for one year?
2 for five years? for 30 years? If they know, they have not
3 said.

4 Dean Latta could not even tell us who was responsible for
5 deciding when this end point is met. We asked him that too.
6 He replied. This is the trial testimony:

7 "Who was in charge of deciding the end point of the use of
8 race in the admissions process?"

9 His answer: "I would assume that would be the
10 superintendent. It would probably follow discussion from the
11 Navy leadership as well as other folks like myself and members
12 of the senior leadership team."

13 Of course, the Naval Academy's decision to define the end
14 point by the racial composition of the student body compared to
15 the general population raises another issue that has kind of
16 haunted the evidence in this case, which is exactly who counts
17 as a minority or particular type of minority to the Naval
18 Academy?

19 Sometimes the Naval Academy excludes single-race African
20 Americans, people with backgrounds like Kamala Harris and
21 Barack Obama.

22 On the screen right now is Plaintiff's Exhibit 259. This
23 is Dean Latta's declaration. And you can see him using
24 percentages that are based on those who identify as single-race
25 African Americans; he's excluding multirace African Americans.

1 But we know that's not a consistent practice in the
2 office. We have seen documents from the Naval Academy in this
3 case, like the "no offer" report -- this is Plaintiff's
4 Exhibit 4 -- where they will pull reports for anyone who
5 identifies even in part as Black or African American.

6 We've seen other evidence that the Academy claims it has
7 to separately break out information about multiracial students.
8 Consider Defendants' Exhibit 28. Dean Latta testified that he
9 was required to report the information on the slide this way
10 where multiracial applicants are in a different category.

11 But we have also seen exhibits like Plaintiff's
12 Exhibit 207, where the class comparison charts submitted to the
13 superintendent does not have a separate multiracial category
14 and anybody who identifies in part as African American is
15 counted that way.

16 What does this mean? They did not have an end point for
17 at least two decades. There's an amorphous definition of what
18 would constitute success now. There's not clear evidence in
19 how they would count the demographics in order to determine
20 whether the success point had been reached. And it's not even
21 clear how or who they would go about deciding the need for
22 racial preferences was over.

23 Now I want to turn to something that actually took up a
24 fair amount of testify at the beginning of the case, which is
25 our view that the Naval Academy does not know exactly how it

1 uses race.

2 At the beginning of the trial, Mr. Mortara told you that
3 there was no dispute that race affected at least some
4 applicants' admissions to the Academy, which is why both sides
5 agree that strict scrutiny applies. Mr. Mortara was correct,
6 as Your Honor heard, as the Academy concedes, there's no
7 dispute that race can be and is used, for example, in
8 recommending someone for early notification or for a letter of
9 assurance in choosing a slate winner which might bump somebody
10 else to the qualified alternate list or in offering additional
11 appointees or superintendent combinations.

12 But the government, for reasons unknown, also attempted to
13 draw a line in this case between the initial qualification
14 recommendations by the admissions board and these other steps.

15 What was the result?

16 I think the evidence shows at least some substantial
17 confusion within the Academy as to when race can be part of
18 qualification, the whole person assessment, and when it cannot.

19 I think Your Honor probably remembers the slide deck we
20 spent a decent amount of time on. This is Defendants'
21 Exhibit 79, page 26. The same deck appears in Plaintiff's
22 Exhibit 491.

23 And we remember this slide that, in the assessment of the
24 whole person, among the things the Naval Academy tells board
25 members -- and, remember, the board turns over -- about a third

1 of the board turns over every year; this is annual training --
2 that they could consider unique life experience,
3 first-generation status, language fluency, adversity or
4 hardship. But they could also consider ethnic heritage, racial
5 or ethnic diversity.

6 Dean Latta told us that this slide had been in the
7 training deck for a number of years. Nowhere in that training
8 deck is a slide that somehow restricts or cabins the use of
9 race to early notification or something other than the
10 assessment of the whole person.

11 And on its face, the slide says exactly what you would
12 think it would if race was to be one factor in the whole person
13 assessment to determine whether an applicant is qualified.
14 That explains why Ms. Hwang, who worked in the admissions
15 office for 10 years, had a difficult time keeping her story
16 straight on the stand at this point.

17 Ms. Yang examined her. She indicated that race could not
18 be used in qualification. But when Mr. Mortara had the chance
19 to reexamine her, she noted that all these things to include
20 ethnic heritage, racial, or ethnic diversity, none of these
21 things on its own will determine whether or not a student is
22 qualified or not; it just all factors into their whole person
23 assessment.

24 Mr. Mortara: "Thank you, Ms. Hwang. But each of them,
25 all of them could be a factor in determining whether someone is

1 qualified, correct?"

2 And Ms. Hwang conceded that "It can paint the picture of a
3 student; so I guess yes."

4 Any doubt about this was subsequently removed when Captain
5 Birch came and testified. Captain Birch, among his duties as a
6 brigade officer, is that he sits on the admissions board. He's
7 now entering his second year on the admissions board. And he
8 was asked whether he uses race in determining whether a
9 candidate is qualified.

10 Question: "This training that you received from
11 Ms. Munnelly reflects your view that, among other factors, race
12 can be used to determine whether a candidate is qualified,
13 correct?"

14 Captain Birch, a member of the admissions board, answered,
15 "Yes."

16 Now, Your Honor may also remember that we had a little bit
17 of interesting discovery in the middle of this trial. There
18 was some additional materials produced, including the training
19 slides that are being used this year at the Academy. That's
20 what's on the screen right now. This is Plaintiff's
21 Exhibit 813.

22 And you can see that it still describes that the
23 admissions board's job had to determine qualification for
24 admission, whole-person qualification which gives somebody the
25 opportunity to compete for an appointment.

1 When you look at the slides that we were looking at
2 earlier -- on the right is Defendants' Exhibit 79, page 26; on
3 the left is Plaintiff's Exhibit 813, page 22 -- a change had
4 been made. And you may remember my exchange with Dean Latta
5 about one of these things, your ethnic heritage, is something
6 you are born with and that you cannot change; and one of these
7 things, cultural fluency, you absolutely can obtain or get
8 information about it and is not necessarily tied to an
9 immutable characteristic, like your race.

10 We asked why this slide was changed. We got a privilege
11 objection.

12 I would suggest that this kind of change to this board
13 document, made on the eve of this trial, is not reflective of a
14 process where the use of race was clear, where the admissions
15 office had control over where race could and could not be used,
16 which is why Captain Birch testified that he did, in fact, use
17 race as part of the qualification decision.

18 One more note on qualification.

19 Dean Latta, and the government, I would suggest, tried to
20 imply that the early notification was a much more confined or
21 narrow use of race and then somehow perhaps more narrowly
22 tailored. But they actually never put in any evidence as to
23 how many applicants to the Naval Academy or how many admits
24 were designated for early notification. We had to put that
25 evidence in.

1 Professor Arcidiacono testified about the data he got from
2 the Academy, and he noted that over 85 percent of those who are
3 admitted received an early notify designation.

4 We heard testimony from Dean Latta, the university -- the
5 Academy is out there competing with people who are in the
6 early-decision processes of filling universities, early notify
7 is an extremely important part of the process at the Naval
8 Academy. And there was no testimony from anybody from the
9 Academy that contradicted this figure.

10 I just want to emphasize, Your Honor, this is not from
11 Professor Arcidiacono's model; this is just his review of the
12 data as it was produced from the Naval Academy.

13 The next point that I want to make is that the Academy
14 does not have any record as to which of its students benefited
15 from race in the process.

16 As Mr. Mortara noted, the Academy -- that the military,
17 generally, is pretty good at keeping records, and we've seen
18 some of that in this case. Consider the dean's brief. This is
19 the packet of information that is circulated to the admissions
20 office, including the dean, you know, maybe once -- once a
21 week, occasionally a little bit less frequently, but more than
22 30 times during any given admissions cycle, as you can see in
23 Plaintiff's Exhibit 465, which is on the screen right now.

24 What we know about this Dean's brief is that it tracks a
25 great deal of information about race. It has comparisons to

1 this year and last year. It talks about how many applications
2 have been received, how many have been completed, how many
3 offers have been made, how many offers have been accepted. And
4 it shows what those numbers are for African Americans, for
5 Hispanic applicants, for Asian, or other applicants.

6 Now, the Academy has talked a lot about how race is just
7 one aspect of diversity that's important to it, that there are
8 other aspects of diversity that they're very focused on.

9 But you may remember, I asked Dean Latta about this, and
10 he agreed with me that there's no similar chart with respect to
11 socioeconomic status; there's no similar chart with respect to
12 rural or urban areas; there's no similar chart that goes out
13 nearly with this frequency that has information about
14 first-generation Americans or first-generation college; there's
15 no similar charts about homes where English is spoken as a
16 second language; there's no similar charts about adversity or
17 hardship. The Dean's brief has information about race almost
18 to the exclusion of other information.

19 We also know that the Navy keeps a tremendous amount of
20 data. For example, there are records that reflect the name and
21 ethnicity of every sailor and officer who has served on every
22 single one of their ships. We saw some studies, which we'll
23 talk about later, that relied upon this data to make some
24 findings.

25 But the Academy cannot tell you which students got in with

1 their boost from race and which ones did not. No one from the
2 Academy can provide any evidence on this point, and neither,
3 for that matter, can Ms. Miller. She admitted yesterday that
4 she does not know how many graduates would have gotten into the
5 Academy if race was not a factor. She could not quantify it.

6 Now, I don't think that the Academy disputes that some
7 people are getting in because of race. If that's not true,
8 then this entire trial has been a tremendous waste of time.
9 We're here to defend the use of race as a factor in the
10 admissions process. But we don't know who those students are,
11 what the qualifications are, or how many there are, at least
12 not from the Academy.

13 That brings us to the next point. The Academy does not
14 know what will happen if it stops using race.

15 It's not disputed in this case that the Academy has never
16 bothered to measure the affect race has on its process or what
17 would happen if it stopped using racial preferences in
18 admissions.

19 Here again, this is Plaintiff's Exhibit 138, the letter
20 sent to the Assistant Secretary of the Navy, where the Naval
21 Academy reported that no modeling had been completed as of
22 August 2022 to evaluate the admissions implications of not
23 considering race.

24 The Naval Academy's witnesses told us as much under oath
25 in this court.

1 "Q. Ms. Hwang, you are unable to say what the racial
2 composition class would look like if race was no longer a
3 factor versus what it looks like today, correct?
4

5 "A. Correct.
6

7 "Q. You cannot give us any quantification or range at all
8 about that, correct?
9

10 "A. Correct."
11

12 Dean Latta also agreed that the Academy has never modeled
13 what its class would look like if race was not used in its
14 admissions process.
15

16 As Your Honor knows, in other cases involving strict
17 scrutiny, defendants in the Academy's position have recognized
18 an obligation to explain what they are doing and what actual
19 effect of it has. You did not see them from the Academy in
20 this case; instead, you got some testimony from Dean Latta,
21 which I'd like to review briefly.
22

23 Testimony from Dean Latta is that it has not conducted an
24 analysis because every year, he looks at the incoming class, he
25 looks at the number of students, not only those that came
 through the prep school but direct entry, quote, and I don't
 feel confident or I have never felt confident because we'll
 still lag significantly in two of the most largest groups of
 minorities that are at the Naval Academy.

26 He elsewhere testified, based on his 23 years working at
27 the admissions office:
28

1 "Do you have an understanding of whether race has had an
2 impact on the composition of the class?"

3 He said he feels very comfortable that it's actually
4 helped.

5 And asked about his view as to whether there would be a
6 regression, he said, "I think the numbers would drop
7 dramatically, yes."

8 Your Honor, feelings, thoughts, dramatic concerns -- those
9 cannot satisfy strict scrutiny. The Navy can track and measure
10 everything in its awesome arsenal, it appears, except for the
11 effect that race is having in its admissions process. You
12 cannot prove that the use of race is narrowly tailored if you
13 cannot measure, quantify, or contain it.

14 Now, to my last point with respect to the Naval Academy's
15 process, which is the Academy, I would submit, is not even sure
16 why it is using race. The Academy seems somewhat confused on
17 this process. And there's a few different points I want to
18 make under this item. This is even before we get to the
19 compelling interest side of the analysis.

20 The first is the Asian preference. This is inexplicable
21 under the Navy's own rationale. Mr. Mortara talked about this
22 at the beginning of the trial. You did not hear the government
23 bring it up with any of their own Academy witnesses. We were
24 the only ones who wanted to talk about the Asian preference
25 during this trial, and I would argue it is not hard to see why.

1 Asian Americans are not underrepresented at the Academy in
2 comparison to the general public, and Dean Latta admitted that.
3 They have been overrepresented compared to their benefits in
4 society for a number of years. In fact, he could not say how
5 long that had been the case.

6 You remember the Government did not mention Asian
7 representation in its opening where it focused on Hispanic and
8 Black representation, in this case, single-race Black
9 representation, excluding anyone who is multiracial.

10 Dean Latta did not mention Asian Americans when he talked
11 about the groups that the Academy is lagging behind or he's
12 concerned or worried about the Academy lagging behind on. He
13 did not mention Asian Americans. And the only explanation from
14 the Academy in the record as to why it still is a preference to
15 Asian Americans in its admissions process is that they are
16 racial minorities. And segmenting one group out from the
17 other, to me, would be another form of discrimination. That
18 was what the testimony was.

19 The ongoing preference that they are giving to Asian
20 Americans is -- I would submit, is devastating to both the
21 Academy's credibility and to its legal case.

22 It's devastating to the credibility because, on one hand,
23 the Academy is telling us that their use of race is limited and
24 they intend to stop when they reach parity with society at the
25 Academy. That's what it says in P293.74. This is their

1 interrogatory response, page 74.

2 "The Naval Academy anticipates that, once it achieves and
3 maintains the racial and ethnic diversity of the student body."
4 And I think that's important. Their own definition is the
5 student body, not officers in the officer corps, in the Navy as
6 a whole, not officers 30 years later at the O6 rank and higher.
7 They're trying to achieve parity on the Academy grounds.

8 But, again, Dean Latta admits that Asian Americans have
9 been overrepresented for years. They have not stopped.
10 There's no indication that they have any intention of stopping
11 giving this preference. And it's devastating to their legal
12 case because there's just simply no justification for it. This
13 is, by the Academy's own account, a completely unnecessary use
14 of race in its process. That is patently illegal.

15 Courts have talked about the fact that, if you have -- if
16 you're using race for one reason and you throw in a bunch of
17 other minority groups that are not tied to the alleged reason
18 you are seeking to use race, that cannot be narrowly tailored.

19 In *Croson*, they talk about the gross overinclusiveness of
20 Richmond's racial preference in that case. In *Alexander*, the
21 Fourth Circuit talks about the fact that an affirmative action
22 program cannot give the benefits to minorities in general; it
23 must be targeting the benefits to the group for the reason they
24 are asserting they need to.

25 The Asian preference, in our view, destroys the

1 defendants' claim that its use of race is narrowly tailored,
2 and they do not have much to say on this point.

3 There's another reason, in our view, that the use of race
4 is not narrowly tailored, even before you get to the
5 preferences -- or to the interest that they have asserted in
6 that case, and that is our view that the Naval Academy is
7 racial balancing.

8 As Mr. Mortara said in his opening, the uniformity of
9 admissions across minority groups and across years is extremely
10 similar to the chart that the Supreme Court used in Harvard to
11 find that Harvard was racial balancing. And it's true whether
12 you use the single-race numbers or you use the multirace
13 numbers. These are the exhibits that Mr. Mortara showed during
14 his opening.

15 This kind of uniformity, at least in Harvard, was deemed
16 to be racial balancing. We do not read Footnote 4 to say the
17 Academy has license to engage in this type of racial balancing,
18 which is necessarily untailored, and we do not think the Court
19 is in a position to hold that the Navy is allowed to racially
20 balance.

21 There's another aspect of the admissions process that, in
22 our view, is per se not narrowly tailored and illegal, and that
23 is because the Naval Academy is attempting to match the
24 population's demographics. The Naval Academy is trying to
25 match the demographics of society as a whole.

1 Look at the *Eisenberg* case from the Fourth Circuit. It
2 specifically says -- in this case it was a Montgomery County
3 school process to try to match the demographics of the school
4 district. The goal of keeping certain percentages of racial
5 and ethnic groups within each school to ensure diversity is
6 racial balancing, and racial balancing is necessarily not
7 narrowly tailored.

8 That's our view as to how the process works.

9 I'm ready now to talk about the interests the Naval
10 Academy is asserting in this case.

11 We know what those interests are. This is Plaintiff's
12 Exhibit 293, the interrogatory response, page 79. The Naval
13 Academy has asserted that it needs diversity in the officer
14 corps to, one, foster cohesion and lethality; two, aid in the
15 recruitment of top talent; three, increase retention; and four,
16 bolster its legitimacy in eyes of the nation and the world.

17 I'm going to have something to say about each of these
18 interests in just a moment. But what is noteworthy -- and,
19 again, this is something Mr. Mortara said at the beginning of
20 the case -- is that the Naval Academy admitted until very, very
21 recently that it was trying to do something else with its use
22 of race in admissions. They were trying to comply with
23 *Grutter*.

24 *Grutter* is about achieving educational benefits on campus.
25 How do we know that? Let's look at Plaintiff's Exhibit 31.

1 This is a letter that the Naval Academy sent to the House
2 Armed Services Committee. It described in November of 2022,
3 less than two years ago, that its policy had evolved for
4 several decades in compliance with the Supreme Court's
5 recognition of an educational value of a diverse student body,
6 as codified in the case of *Grutter v. Bollinger*.

7 It went on to say, "Maintaining a diverse student body at
8 USNA promotes an essential change of different experiences and
9 ideas critical to best educating midshipmen for their roles and
10 responsibilities that will be expected of them in the Navy and
11 Marine Corps."

12 Now, we also see in Plaintiff's Exhibit 491 -- this is the
13 guidance that was given to the admissions board -- that the
14 Naval Academy's goal is to create an educational experience
15 enhanced by interaction of students with different perspectives
16 to prepare students to lead in diverse environments.

17 This is educational benefits. Neither of the two
18 documents we just looked at mention lethality or unit cohesion
19 or recruiting or retention; they're talking about educational
20 benefits.

21 Even in this trial, Your Honor, some of the witnesses the
22 Academy put on indicated that the reason that the Naval Academy
23 is using race, as Mr. Vazirani testified, "By allowing for a
24 limited use of race in the admissions process, we ensure that
25 we have a mix in the diversity at the military service

1 academies that will help those individuals who are training
2 there to gain a perspective of people with different
3 perspectives, different backgrounds, different lived
4 experiences."

5 And Ms. Hwang testified herself that not only had the
6 Academy been using race in the 10 years she'd been there, it
7 was the reason why race was being used had not changed in those
8 10 years' time. And we know that, as early as two or three
9 years ago, the Academy was trying to pursue *Grutter*, the
10 educational benefit interest. That's what it told the House
11 Armed Services Committee.

12 Now, the Academy is no longer relying on that interest in
13 this court, which we think is wise after *Harvard* and *UNC*. But
14 it still presents a couple of problems for them.

15 First of all, Ms. Hwang also testified that the way they
16 use race has not changed. And we did not hear any testimony
17 that something changed in how they're actually using race in
18 their admissions process pre-2022 and post-2022.

19 And that's a problem for them because a use of race that
20 is calibrated, that is tailored to bring about a critical mass
21 of minorities on campus who you can facilitate educational
22 exchanges, cannot also be narrowly tailored, simultaneously
23 tailored, to a use of race that supports all the other
24 interests that we're about to talk about. A uniform that is
25 one size fits all, by definition, is not narrowly tailored.

1 And I'd submit there's a second problem too, which is that
2 the inability of witnesses to all describe what purpose race is
3 being used in the admissions process for is proof that it's not
4 narrowly tailored.

5 Some witnesses say it's being used for one reason; others
6 say it's for a different reason. The burden is on the
7 government in this case, having decided to use race, to make
8 sure its reasons are consistent, testable, and controlled. A
9 use of race that is different things to different people is not
10 narrowly tailored.

11 Now let's turn to the actual interests that the government
12 has put forward in this case. I will explain why the Academy's
13 use of race on the front end of accessions at the Academy
14 cannot meaningfully advance those interests.

15 The first one, we're all familiar with, is lethality and
16 unit cohesion. The Academy claims that racial preferences at
17 its institution advance the goal of increasing lethality and
18 unit cohesion in the military. The problem for them, as I will
19 explain, is that there are no real studies or other evidence
20 that demonstrates this assertion to be true.

21 And, indeed, the Academy's own witnesses appear to ignore
22 actual studies of military performance which make no
23 connections between the diversity of ship crews or officers in
24 the military and lethality or unit cohesion.

25 On the first day of this trial, Your Honor, General Walker

1 said this. He talked about his experience in the Air Force and
2 in the Air National Guard. He said in his 40-year career -- he
3 was asked, "Have you ever seen data or studies showing that
4 racial diversity affected unit performance in the operational
5 setting?"

6 General Walker testified, "I never saw one. And, believe
7 me, I was looking."

8 And we saw this actually play out in court.

9 Let's discuss Dr. Haynie's testimony. Dr. Haynie was the
10 star witness, the key witness, for the government on the
11 question of whether there were studies that supported its
12 interest in unit cohesion and lethality.

13 There is no doubt that Dr. Haynie provided a very
14 compelling personal story. Everybody agrees with that. But
15 she could not provide anything in the way of actual evidence
16 that links diversity in naval operations with better
17 performance, increased unit cohesion, or lethality.

18 And Your Honor will remember that Dr. Haynie admitted on
19 the stand she was not even familiar with the Navy's recent
20 study on performance and diversity among destroyer groups.
21 That's Exhibits P800. We'll talk about that in just one
22 second.

23 But what's notable is that this study was included on a
24 list of studies the Navy itself identified as relying on in
25 this case.

1 If you go back to Plaintiff's Exhibit 293, which is the
2 interrogatory response, they were asked in Interrogatory 9 to
3 identify studies that they were relying upon. They provided a
4 representative sampling of documents created by, commissioned
5 for, or relied upon the defendants concerning their compelling
6 interests in the use of race at the Academy.

7 If you go to that response, if you go down to page 57,
8 you'll see this is the Helzer, Lester, Tick study on assessing
9 the relationship between diversity, inclusion, and Navy unit
10 performance. This is P800 on their own interrogatory response.

11 Who signed that interrogatory response on behalf of the
12 Department of Defense? Dr. Haynie signed that response.

13 And yet -- and I'm sure we remember this from
14 cross-examination at trial. Mr. Mortara handed her a copy of
15 the very study. And he noted that the title of this article is
16 "Assessing the Relationship Between Diversity and Navy Unit
17 Performance."

18 He said, "Let's pause here for a second. Just from the
19 title, you might think this is highly relevant to your opinions
20 in this case, right?"

21 Dr. Haynie said, "Yes."

22 **"Q.** Did this come up in your literature review?

23 **"A.** No, it did not. I'm fascinated too."

24 Mr. Mortara asked, "You're telling me you've never seen
25 this before?"

1 And she answered, "I have not."

2 That is stunning, Your Honor. In an area where there are
3 so few on-point studies specific to military performance and
4 racial diversity, she could not speak to one published by the
5 Navy in March of this year.

6 And there's a reason that the government -- which, again,
7 bears the burden of proof in this strict scrutiny case --
8 didn't put on any testimony about this study.

9 P800 offers no support for the Navy's assertions of better
10 performance. And you can see it highlighted here in the
11 abstract. Across all diversity and performance indicators
12 examined, there was nonuniformity in the relationship observed,
13 and none of the diversity indicators was consistently and
14 reliably associated with both indicators of performance that
15 they measured.

16 What we are left with, since the government does not want
17 to talk about P800, are a number of studies, some quite old,
18 many from the civilian context, and many of which, as
19 Mr. Mortara's examination demonstrated, do not actually support
20 any finding about effects of racial diversity on performance.

21 And I just want to note this is another problem for the
22 government in this case. On one hand, they insist the
23 experience at civilian universities is not relevant to the
24 Naval Academy. They insist that the experience of the Coast
25 Guard Academy is not relevant to the Naval Academy.

1 But then, in an effort to support the interests, what are
2 they relying on? Mostly civilian studies, mostly studies from
3 the private job market, which is very different from military
4 actions and military interests.

5 And then even the military-adjacent studies are not
6 exactly hovering over the target. Dr. Haynie on the stand
7 repeatedly brought up, for example, this Farh study about
8 "Token Female Voice Enactment in Traditionally Male-Dominated
9 Teams: Facilitating Conditions and Consequences for
10 Performance."

11 And this is another problem that's kind of been a theme in
12 this case. Gender or sex is not race. This case is about a
13 racial classification. Nobody is challenging a sex or gender
14 classification. And there is no intersectionality clause in
15 the United States Constitution. Certainly, there is nothing
16 that they have identified that comes nearly as close to being
17 relevant as the study at P800.

18 Studies removed from military performance and race just
19 simply cannot meet their burden under strict scrutiny. Why do
20 we know this to be true? The Fourth Circuit has told us in a
21 case involving racial classifications used by the City of
22 Charlotte.

23 It was relying on studies, for example, from reports of
24 urban riots in the city of Detroit in the 1960s. What did the
25 Fourth Circuit tell us? That was not sufficient. In order for

1 Charlotte to survive strict scrutiny, it was obligated to offer
2 strong objective evidence why the situation evaluated in these
3 studies is analogous to the present circumstances in Charlotte
4 in 1991.

5 I'll also note, Your Honor, that Professor Lyall does not
6 offer much help to the Navy on this point. His primary
7 contribution to the literature is not an analysis of diversity
8 but of actual inequality, which means the military is using
9 enslaved or oppressed populations in its forces.

10 He concedes that the United States has no legal
11 discriminatory regime against any minority group and that, even
12 when it did more than 50 years ago, the United States has
13 always been in his lowest inequality band.

14 And the only U.S. Navy study that Professor Lyall cited
15 showed mixed results. This is another Naval postgraduate
16 study. This is Plaintiff's Exhibit 872.

17 Remember how Professor Lyall had to admit that he had
18 reported a key statistic in his case incorrectly in his
19 testimony. Officer retention in medium ships and submarines
20 was studied. The question was, if we increase same race
21 leadership by 10 percent, do we see a difference in junior
22 officer retention?

23 Dr. Lyall, in his report and to support his testimony in
24 this court, claimed that that increase led to increased Black
25 officer retention. But as you can see the finding highlighted

1 here, the actual study suggests that a 10 percentage point
2 increase in Black senior leadership had a negative impact on
3 junior Black officer retention, reducing it by 2.8 percentage
4 points compared to junior non-Black officer retention. That is
5 their expert story in a microcosm, Your Honor.

6 Now, something very interesting happened in this case
7 following the cross-examination of Dr. Haynie and Professor
8 Lyall. The government's focus began to shift. As you know --
9 and I think we've seen some examples; I can put them back up on
10 the screen -- the government began this case by repeatedly
11 asserting diversity was critical to battlefield performance,
12 lethality.

13 They say that in Plaintiff's Exhibit 293 on page 81.
14 They're talking about fostering cohesion and lethality. Dean
15 Latta's declaration in this case, Plaintiff's Exhibit 259, in
16 paragraph 87 quotes the Naval Academy's own strategic plan to
17 say -- to assert that a diverse workforce is a force multiplier
18 required to maintain maritime superiority and dominance on the
19 battlefield. This was a battlefield argument.

20 But the government stopped talking about that after
21 cross-examination. You may remember Admiral Fuller came in.
22 And Admiral Fuller told a different story. Admiral Fuller was
23 asked by the government, "Is it your view that a ship with a
24 racially diverse leadership is better at launching Tomahawk
25 missiles than a nondiverse unit?"

1 Admiral Fuller testified there's no credibility to say
2 there's any difference. He was asked, "Is it your view that a
3 ship with a racially diverse leadership is better at detecting
4 enemy submarines than a nondiverse ship?"

5 "A. Same thing. If the only difference is the racial
6 composition of the crew, there's no way to say that's a
7 reasonable assumption to make."

8 This testimony is consistent with the testimony of
9 plaintiff's expert Dakota Wood. He testified to the same
10 thing. The government stopped talking about lethality and
11 performance after the cross-examination of Dr. Haynie and
12 Professor Lyall and began to focus more about its other
13 interests -- recruiting, retention, and legitimacy -- because
14 they know they cannot meet their burden under strict scrutiny
15 to actually point to relevant studies that support their
16 contentions. Admiral Fuller says as much, and that is where
17 this issue rests.

18 Let's talk about the evidence on their second interest,
19 recruiting. Well, the evidence in the record demonstrates one
20 thing. This is from the RAND report that, again, Dr. Haynie
21 put into evidence and relied upon. And you can see on the
22 chart on the right here -- this is from page 39 of this
23 document, Defense Exhibit 171 -- that every minority group
24 actually has greater propensity to serve than White Americans.

25 We also heard testimony yesterday about more steps that

1 the Navy could be taking and the Naval Academy could be taking
2 to increase minority recruiting that would not involve the use
3 of race.

4 The Military Leadership and Diversity Commission issued a
5 report 13 years ago advising them to explore things like
6 combining the ROTC and Academy application portals. But that
7 hasn't happened. It suggested that they partner with more
8 institutions in areas that are heavily minority populated.
9 They suggested that they make changes to NAPS. We did not hear
10 much about any specifics.

11 None of that appears to have actually happened. The
12 Academy appears to simply prefer the convenience of using race
13 as a basis -- one basis that might influence whether you get
14 into Annapolis.

15 Your Honor has also heard some testimony about the
16 importance of seeing people who look like them, of racial
17 minorities wanting to see representation in the ranks. I would
18 argue that is not a sufficient compelling interest. It rests
19 upon an assumption that every racial minority feels that way,
20 which is simply a form of racial stereotyping.

21 And it brings to mind some of the contradictory testimony
22 we heard from their own witnesses in this case. Mr. Vazirani
23 was asked by the government on direct whether the department
24 was assuming that officers who are women or are from a
25 particular racial group will have a particular perspective.

1 The department doesn't presume that, Mr. Vazirani said,
2 just based on one dimension of diversity, whether it's gender,
3 race, or ethnicity, that anyone would have a particular
4 perspective.

5 But then later in his testimony when he was asked, "Why
6 does the Naval Academy permit the consideration of race to some
7 extent in admissions?" he testified that it was to ensure we
8 have a mix in diversity at the military services academies that
9 will help those individuals who are training there to gain a
10 perspective of people with different perspectives, different
11 backgrounds, different lived experiences.

12 People of all races obviously have different perspectives,
13 different backgrounds, different lived experience even within
14 the same racial group. Trying to link racial diversity to
15 particular perspectives is simply a form of stereotyping.

16 The story on retention and promotion, their third
17 interest, is just as difficult for the defendants in this case.
18 Minority officer retention rates -- this is from Defendants'
19 Exhibit 151, page 3 -- are higher than those of White officers.

20 As Your Honor can see on the screen, Black and African
21 American and Hispanic officers overwhelmingly choose to stay on
22 active duty for 20 years and make the military a career, unlike
23 many of their White peers.

24 And the disparity at the flag officer ranks, which I know
25 Your Honor has noted, is not a straight line either. As

1 Ms. Miller confirmed, many officers who are minorities in the
2 Navy today started their careers in the enlisted ranks, which
3 means they hit their 10- and 20-year service marks earlier than
4 other officers.

5 The Navy also concedes that flag officers come
6 disproportionately from the ranks of specialties like special
7 warfare, aviation, and submarines. We know that very few
8 minorities from the Academy enter into those communities.
9 There are probably many reasons for that.

10 As Ms. Miller testified, it may be a matter of personal
11 choice. But it may also be because the Navy has decided to
12 impose additional requirements in these competitive positions.
13 Requirements such as having a high overall order of merit or
14 academic performance.

15 We recall Mr. Vahsen's testimony -- Captain Vahsen's
16 testimony about what the Academy's own data show, that for the
17 overall order of merit at the Academy, minorities are
18 disproportionately likely to fall at the low end of the
19 rankings. And you can see that in this chart here.

20 You'll notice that there's no real disproportion of
21 representation until you get to about 900. And then you can
22 see, particularly with respect to Black applicants, they are
23 sort of clustered at the bottom of the overall order of merit
24 rankings.

25 We don't have to guess about this. The government itself

1 entered into evidence a study on this precise question. This
2 is the study from the RAND Corporation.

3 Remember again that Ms. Haynie, who testified she relied
4 upon this study, seemed completely unfamiliar with its actual
5 conclusions and recommendations. And what did the RAND
6 Corporation find?

7 Well, it found that things like overall order of merit at
8 the Air Force Academy was actually correlated with promotion to
9 the senior officer levels, which is why it noted -- and you can
10 see in the highlight -- this is on page 75 of this exhibit,
11 Defendants' Exhibit 171 -- that several characteristics are
12 strong predictors of promotion to senior levels that start with
13 characteristics developed early in an officer's career.

14 What was RAND's recommendation? Recruiters, college
15 selection officials for ROTC and the Air Force Academy, and
16 those responsible for final selection for commissioning need to
17 identify applicants of all racial and ethnic groups who are of
18 high and comparable quality.

19 This means that high school students selected for ROTC and
20 USAFA need to be comparably strong, that ROTC programs should
21 draw from highly selective colleges and universities, and that
22 minority cadets at the Air Force Academy should have the same
23 level of qualifications on average as White cadets.

24 Again, it is the Navy that entered this study into the
25 record to support their claim. It cannot simply turn around

1 and ignore these conclusions which directly undercut its
2 dedication to racial preference.

3 I want to say a word about legitimacy, the final interest
4 that the Naval Academy has asserted in this case.

5 The Supreme Court has always made it clear that use of
6 race cannot survive strict scrutiny if the interest cannot be
7 measured. It can't be narrowly tailored if there's no way to
8 judge whether the interest is being achieved and the racial
9 preference is no longer necessary.

10 I do not understand how the Court is supposed to measure
11 the domestic and international legitimacy of the United States
12 military, let alone tie it to a decision to use race for
13 admissions.

14 Are we supposed to use public opinion polling?

15 Well, the evidence about public opinion polling that's in
16 the record in this case is that the public broadly opposes the
17 use of race as a criteria for college admission.

18 Are we going to go on recruiting rates?

19 The testimony in this trial strongly indicated that the
20 recruiting crisis in the military right now is related to
21 eligibility restrictions, things like weight requirements,
22 marriage, perhaps criminal convictions. And, of course, the
23 Navy could change those things.

24 Remember, minorities have a greater propensity to serve
25 than White Americans. Domestic legitimacy cannot be measured,

1 and that makes it a legally unsustainable basis for using race
2 as a criteria.

3 Nor am I sure how they're supposed to measure foreign
4 legitimacy. Is it legitimacy among our allies? Which allies?
5 Among neutral countries? Which countries? Among our enemies?
6 Which enemies? The evidence on compelling interests, whether
7 they be unit cohesion, lethality, recruiting, retention, or
8 legitimacy, falls quite short.

9 But the Academy has an even bigger problem in trying to
10 survive strict scrutiny. Its program for racial preferences,
11 by all the testimony in this record, is simply too small to
12 meaningfully achieve the interests it claims it wants. This is
13 where the government's case really falls apart.

14 The undisputed testimony here is that the Naval Academy
15 provides one out of every five officers who enter the Navy each
16 year, more than one out of every four on the unrestricted line.
17 This is why the Boston Consulting Group in Plaintiff's
18 Exhibit 330, page 37, noted that the Naval Academy alone has
19 low leverage to change the composition of the overall fleet
20 corps. There are simply too many officers coming from other
21 sources.

22 And, remember, eliminating the use of race at the Academy,
23 by all of the testimony in the record does not take the
24 Academy's minority population down to zero. Our expert
25 witness, the only one who has actually done this kind of

1 analysis before, Professor Arcidiacono, testified about what
2 the effect would be if race was not a factor in the admissions
3 process.

4 And according to his model -- you can see the box I've
5 highlighted here is for two years of admissions. That's the
6 class of 2023 and 2024. In Professor Arcidiacono's model, it
7 indicates that 56 Black applicants were admitted based on the
8 use of race. That means approximately 28 per -- per year?

9 And, of course, if the Court decides instead to credit
10 Dr. Gurea's testimony, the impact is even smaller. Dr. Gurea
11 testified that Professor Arcidiacono had overestimated the
12 impact of race and that, if you actually looked at things that
13 the Academy might do in response to using race, things like
14 Mr. Kahlenberg testified are available to the Academy to
15 increase its minority retention, the entire effect could
16 completely go away.

17 If Dr. Gurea is right, this case is over. If race is
18 having that small of an impact on the Academy's admissions
19 process, there's no way that it can survive strict scrutiny.
20 It could never meaningfully impact the balance of the racial
21 demographics in the officer corps. And a pointless racial
22 preference is never constitutional.

23 But let's assume Professor Arcidiacono is right. The Navy
24 makes no other changes to its admissions program, and the small
25 difference in representation is simply swallowed up by the

1 larger officer corps.

2 We're talking about, in the case of Black officer
3 representation, 26, 27, 30 officers that goes into an 01 corps
4 of 6,825 officers? That's 30 officers out of 6,000. That's
5 one half of 1 percent of the overall number of 01s. That
6 cannot meaningfully change the composition of the officer
7 corps. It's too small of a number, just like the Boston
8 Consulting Group noted in Plaintiff's Exhibit 330.

9 And I will note, Your Honor, that Ms. Miller testified
10 about a number of charts that were produced in this case that
11 only told the story about Naval Academy admissions and what's
12 happening with Naval Academy officers in the Navy.

13 They easily could have presented evidence so you could see
14 what the change over time was among ROTC accessions, among OCS
15 accessions. They didn't produce that data, and the burden is
16 on them.

17 And recall again that the Navy has decided not to use race
18 to determine assignment to duty stations or promotions.
19 Ms. Miller testified that this helped -- it doesn't use race in
20 ROTC and OCS, and this helps ensure that the military remains a
21 meritocracy.

22 But the implications for the case are startling. Despite
23 claiming vital military interests, the Navy is simply hoping
24 that its limited use of race on the front end for one accession
25 source that only produces 28 percent of its officers is going

1 to reap benefits across the entire Navy as we wait for 10, 20,
2 30 years in the future.

3 This is a classic example of a use of race far too
4 attenuated to achieve the asserted interest. The Supreme Court
5 has already told us this kind of limited marginal use of race
6 is unconstitutional. That's the case of *Parents Involved*.

7 When you are using a racial classification and you are
8 only having a minimal impact on the district's overall racial
9 makeup, it is simply not enough to justify racial
10 classifications.

11 The Constitution requires more than such an amorphous end.
12 The minimal effect that these classifications have means the
13 district in *Parents Involved* and the Naval Academy here simply
14 cannot meet their burden.

15 If the Navy really believed that these interests were as
16 important as it asserts, it would not choose such a roundabout,
17 indirect way to achieve them. They could change their policies
18 to ensure submarines and aviation gets better crews. They
19 could change the eligibility requirements for special warfare
20 or aviation. Or it could adjust its flag promotion policies so
21 that admirals are not selected disproportionately from those
22 communities.

23 What the Navy cannot do under the equal protection
24 principle of a Fifth Amendment is use a person's skin color as
25 a factor in qualification in such an attenuated and meaningless

1 fashion, just like it cannot try to balance the Academy's class
2 to the general population, just like it cannot rely on a desire
3 to increase the number of mentors and role models. The
4 *Podberesky* case from the Fourth Circuit on the screen says
5 that.

6 Now, Your Honor, I want to just end my argument on why
7 this all matters.

8 It is not an accident that our Constitution singles out
9 race as a forbidden classification. Racial classifications are
10 wrong. Your immutable characteristics do not say anything
11 about what you believe, who you are, what you are capable of,
12 and how you can represent your country.

13 And I think we all remember General Walker's testimony on
14 this point after lunch on the first day. He said, "You can't
15 tell anything by someone's skin color. Let's say the whole
16 jury area over there was filled with Black people. There's
17 nobody in this court or in this world who could point to any of
18 them and tell me what traits they have, what strengths they
19 have, what ideas they have, or how they think. Attempting to
20 do that would only be stereotyping."

21 And I want to make this very clear, Your Honor. Students
22 for Fair Admissions has the utmost respect for our military and
23 for everyone who volunteers for it. I myself am the son of a
24 retired Navy captain and an Annapolis graduate. I am the
25 father of a service academy student. I grew up around

1 shipyards and sub bases. I know what it means to sing second
2 at the Army-Navy game. I am well aware of the sacrifices
3 inherent in military service, and I have laid wreaths in
4 Arlington on the graves of our country's heroes. Heroism and
5 the commitment to serve do not depend on somebody's race.

6 Dean Latta told some amazing stories about some of the
7 applicants to the Academy. I remember his testimony about the
8 applicant who had to save his sister from being attacked by a
9 drunken boyfriend or the girl who lost all of her friends in
10 high school because she turned them in for cheating on an exam.

11 Those are exactly the kind of people we want in our
12 military. But I don't care what color they are. No one
13 should. Those actions are honorable if the applicants were
14 Black, if the applicants were Korean American, if the
15 applicants were Mexican Americans, or if they were White
16 Americans. People who want to serve deserve the opportunity to
17 do so without their race playing any part.

18 The Navy has decided the qualifications that it wants.
19 The Navy has decided that the WPM is the best predictor of
20 success, that math SAT scores are valuable, that STEM degrees
21 are important. It has decided that the overall order of merit
22 matters in its process and that there are additional
23 requirements for aviation, special warfare, and submarines.
24 SFFA didn't set those criteria; the Navy did.

25 Nor does SFFA believe that heroes like Captain Birch and

1 Admiral Fuller are admitted on their race. We certainly are
2 not asking you to make that inference.

3 Admiral Fuller was admitted to play football at the
4 Academy, where everybody agrees race plays no role in the
5 admission of recruited athletes. And with the additional time
6 and stress associated with playing football at the Navy for
7 four years, he acquitted himself well, went on to graduate
8 school, and served our country honorably.

9 Captain Birch obviously stands on his own merits, having
10 obtained entry into the most elite of the combat forces in the
11 Navy.

12 It would be offensive to diminish these men's
13 accomplishments by implying that race is the reason they got
14 into the Academy. That, after all, is one of the reasons the
15 Supreme Court tells us there's no such thing as a benign racial
16 classifications. They can sow doubt and animosity where none
17 is deserved.

18 Your Honor, racial classifications are not made any more
19 palatable when they come in uniform. Our military's sad
20 history of segregation and discrimination demonstrate this
21 point, and the Constitution does not give the Navy a free pass.

22 The evidence in this case overwhelmingly demonstrates that
23 the Academy's racial preferences for Black, Hispanic, and Asian
24 American applicants are not justified, are not needed, and are
25 not narrowly tailored.

1 Now, the government is going to follow me up here in just
2 a moment. What are you going to hear from that? Probably a
3 plea for deference. Deference, deference, deference.

4 Your Honor is familiar with our position on that. The
5 Supreme Court has never deferred to the government in a racial
6 classifications case. Strict scrutiny simply does not allow
7 it. Deference and strict scrutiny transforms that analysis
8 into something else. We have little doubt that this Court,
9 just like the Supreme Court, would reject any suggestion that
10 the military gets a free pass to use race.

11 We ask for an order enjoining the use of race in Academy
12 admissions, Your Honor. Thank you.

13 **THE COURT:** Thank you very much, Mr. Strawbridge.
14 Thank you very much.

15 And with that we'll now hear from counsel for the Academy,
16 Ms. Yang.

17 Ms. Yang, be glad to hear from you.

18 **MS. YANG:** Thank you, Your Honor.

19 War, at heart, is a human endeavor. It's people who
20 create war, who end war. And people are different based on
21 where they come from, what they look like, how they're
22 perceived and received, what experiences they've had. That
23 human dimension is central to war. So we have to bring in that
24 human dimension and all of the mix of characteristics,
25 including, yes, race and ethnicity that go into it.

1 What does that human dimension look like for the military?

2 Admiral Fuller, a three-star admiral in the United States
3 Navy and graduate of the Naval Academy, came before the Court
4 this week and explained that a diverse ship is a better ship,
5 more professional, more respectful, more effective.

6 The diverse leaders create relatability, empowerment, and
7 energy among young people both within and outside the military.
8 But because the military's number one asset is its people, it
9 makes sense to make people and teams as good as they can be to
10 most effectively achieve the mission.

11 Admiral Fuller's testimony is unrebutted and unchallenged.

12 Captain Birch, an 06 Navy SEAL and Naval Academy graduate
13 who has led sailors all over the world, described for the Court
14 how his presence, as a black leader, ensured that another black
15 SEAL felt comfortable reporting racist harassment, how that
16 racism tore at the trust and morale in that unit, resulted in
17 reassessments, and took operators offline during a deployment;
18 how Captain Birch enhanced SEAL Team 10's legitimacy with
19 African partners and, in delegations to China and Bangladesh,
20 put on display for the world that in the United States you can
21 be of any background and achieve command. Captain Birch's
22 testimony is unrebutted and unchallenged.

23 Your Honor also heard from Undersecretary of Defense
24 Vazirani, who leads the Office of Personnel and Readiness, and
25 Deputy Assistant Secretary Miller, who is in charge of military

1 personnel policy at DoD. Both former Navy officers themselves,
2 they articulated the department's longstanding judgment that a
3 diverse officer corps is a risk mitigator and that it's
4 critical to recruitment, retention, and legitimacy both at home
5 and abroad.

6 And they, along with Dean Latta, explained the significant
7 way the Naval Academy feeds into that national security
8 interest as the premiere source of officers commissioning into
9 the warfighting communities, the unrestricted line. That
10 testimony also is unrebutted and unchallenged.

11 Now, before we go on to these two distinguished
12 historians, I do want to note that, during plaintiff's closing
13 argument this morning, Mr. Strawbridge suggested that the Naval
14 Academy's interest is only in educational benefits, just like
15 in *Grutter*. But that's not correct, Your Honor.

16 As Your Honor will recall from documents such as P31,
17 which Mr. Strawbridge shared this morning, the documents talk
18 about preparing future officers to lead sailors and Marines.
19 That goes directly to the interest that we have asserted.

20 Now, here, we have two distinguished military historians,
21 Professor Bailey and Dr. Sherwood, who walked through the
22 racial conflict that undermined U.S. military and naval
23 readiness from World War II through the Vietnam War; from a
24 tragedy at Port Chicago, where 320 primarily Black sailors
25 loading explosives were killed while being raced by their White

1 officers; to efforts to prevent White service members from
2 being commanded by Black officers and the resulting erosion of
3 trust and cohesion; to thousands of racial confrontations
4 involving African Americans, Puerto Ricans, and others in U.S.
5 military installations as well as around the world, damaging
6 our relations with our foreign allies; to numerous instances of
7 racial unrest in the Navy where investigations revealed the
8 lack of minority leader as among the reasons for the riots; to
9 other incidents in the Navy, such as on the Kitty Hawk carrier
10 where the presence of a minority officer, however rare that was
11 at the time, actually put an end to the racial unrest,
12 prevented mass casualties, and kept ships online.

13 As Professor Bailey and Dr. Sherwood explained, that long
14 history of racial conflict in the military led to tremendous
15 frustration and skepticism and damaged the military's legitimacy.
16 This testimony, again, is unrebutted and unchallenged.

17 And it led, as Your Honor will recall from our opening
18 statement and our experts' testimony, to the military's
19 recognition that it was necessary to increase the number of
20 minority officers and visible minority leadership, not to
21 remedy past discrimination but to mitigate avoidable military
22 risk.

23 There is no serious dispute over the military's compelling
24 national security interest in this case. In addition to the
25 testimony from senior military leaders and officials at the

1 Department of Defense, the Court has seen document after
2 document setting forth the military judgment that a diverse
3 officer corps is a national security imperative.

4 Now, plaintiff during trial and again during closing
5 argument has resisted the military's judgment that diversity
6 improves performance and cohesion.

7 Your Honor will recall that plaintiff spent a lot of time
8 cross-examining Dr. Haynie, who used to fly attack helicopters
9 for the Marine Corps, and Professor Lyall, who has analyzed
10 data from more than 800 armies and hundreds of wars.

11 Plaintiff tried to show that there are some mixed findings
12 in this area, although Dr. Haynie said it best when she said,
13 "This is social science around complex topics. I do not expect
14 that every relationship will play out the same way in every
15 scenario." But Dr. Haynie did confirm that the weight of
16 evidence shows the value of diversity inclusion in the
17 military.

18 Your Honor will also recall that plaintiff did not
19 challenge any of Dr. Haynie's other three opinions on this
20 matter, that diversity and inclusion support recruitment and
21 retention, enhance domestic and international legitimacy, and
22 reflects a consistent and enduring military judgment.

23 As I mentioned earlier, they also did not challenge
24 Undersecretary Vazirani or Ms. Miller or Admiral Fuller or
25 Captain Birch on these issues.

1 That silence speaks volumes. It tells the Court the
2 defendants have established a compelling military interest.

3 Now, on the one aspect of compelling interest that
4 plaintiff has not conceded, plaintiff brought in two retired
5 officers who disagree with the military's judgment that a
6 diverse military is a more effective military. To be clear,
7 they are absolutely entitled to their own views. But a couple
8 quick notes on General Walker and Colonel Wood.

9 First, both affirmed the importance of military history.
10 As shown here on Slide 6 on the left, Professor Bailey
11 explained that the military trains their officers in military
12 history. They emphasize the importance to their leaders of
13 looking to history for lessons learned. Undersecretary
14 Vazirani made the same point. The department is a learning
15 organization.

16 And General Walker and Colonel Wood agreed, as the Court
17 can see on the right. To use General Walker's words, "Any flag
18 officer who hasn't studied military history is making a big
19 mistake." And Colonel Wood's words are there as well.

20 So although plaintiff has tried to say that the history is
21 all in the past and racial tensions are no longer a problem in
22 today's military, everyone who has actually taken the stand in
23 this case agrees that military history is highly relevant to
24 military judgments, and certainly Admiral Fuller and Captain
25 Birch's testimony and the Air Force surveys that General Walker

1 was confronted with dispel any claim that racial discrimination
2 in the military is merely a thing of the past.

3 Second, plaintiff's witnesses also acknowledge that their
4 views on diversity are different from the judgment that our
5 military and civilian leaders of the armed forces have made
6 over decades. This means that General Walker and Colonel
7 Wood's personal opinions are, with all respect for their
8 service, quite beside the point.

9 Those aren't my words. They belong to the Supreme Court,
10 as shown here on Slide 7. Military judgments are decided by
11 the appropriate military officials, not by a plaintiff's paid
12 experts.

13 What's another problem with the testimony plaintiff has
14 elicited from their military experts?

15 Your Honor will recall testimony such as "Racial balancing
16 won't help us beat our adversaries." "The service academies
17 should hold everyone to the same high standards." "The
18 military should not lower standards based on identity."

19 But, of course, that is not at all what the military is
20 doing, and plaintiff's suggestion that the military's interest
21 in a diverse officer corps somehow conflicts with high
22 standards is, frankly, offensive and baseless.

23 Your Honor saw from plaintiff's opening statement and
24 their case during trial that they think SAT scores and class
25 rank are what make a good officer.

1 Tell that to Admiral Fuller, who graduated towards the
2 bottom of his Naval Academy class, yet today is a highly
3 decorated three-star who has outlasted every one of his
4 classmates in the Navy.

5 Tell that to Captain Birch. He had to go through the
6 Naval Academy prep school, and he was at the bottom half of his
7 Naval Academy class in terms of academics, yet he has gone on
8 to become a senior leader in one of the most elite forces in
9 the military.

10 Tell that to the Naval Academy, whose very mission is to
11 produce high-quality officers for the warfighting communities.

12 As Dean Latta, Captain Vahsen, and other Naval Academy
13 witnesses testified, they look for many other characteristics
14 beyond academics, things like grit, motivation, leadership,
15 resilience, moral character, and are even willing to take some
16 academic risk when those other factors are present because
17 these are the leaders who will order sailors and Marines to lay
18 down their lives.

19 And Undersecretary Vazirani told the Court that the
20 Department of Defense is certainly not lowering standards. He
21 described how the Naval Academy has not only continued to
22 produce high-quality officers but that the quality has only
23 gotten higher, that the officers coming out of the Naval
24 Academy go on to achieve the most senior ranks in the military.

25 So plaintiff saying that competence and high standards are

1 what's important to military readiness completely missed the
2 point. Those are baseline requirements for our
3 professionalized force. What the Department of Defense is
4 talking about here is the additional element of a diverse
5 officer corps being a strategic advantage.

6 Who else has made that judgment? Congress.

7 As the Court has seen in P445, here on Slide 9, Congress
8 established the Military Leadership Diversity Commission in
9 2009 specifically to evaluate policies that shape diversity
10 among military leaders. And in their final report, the MLDC
11 concluded that the armed forces must develop a demographically
12 diverse leadership and that it lacked a continuing stream of
13 leaders as diverse as the nation they serve.

14 Congress again stressed the importance of diverse officers
15 just last year. As shown in DX128, here on Slide 10, Congress
16 was concerned that the military service academies do not
17 maintain a strong enough presence among minority and low-income
18 communities, and it directed that each of the services increase
19 that diversity.

20 That combined military and legislative judgment is
21 entitled to deference under extensive Supreme Court precedent.

22 Earlier we saw the *Goldman* and *Trump v. Hawaii*
23 authorities. Slide 11 here shows three more: *Youngstown*,
24 *Rostker*, and most recently, Justice Kavanaugh's concurrence in
25 *Navy SEALS*.

1 Deference doesn't mean judicial abdication. Here it just
2 means that the two other coordinate branches of our government,
3 the executive and legislative, have made a considered military
4 judgment, and it's not the role of the Court to second-guess
5 it.

6 So under established principles of deference, the Court
7 can and should put the personal views of General Walker and
8 Colonel Wood and, ultimately, plaintiff to the side.

9 Before I move on to narrow tailoring, I want to address
10 the issue of quantification. And, here, let me take a step
11 back.

12 Throughout the trial, plaintiff has tried to treat this
13 case like the *Harvard* case. But as Your Honor has repeatedly
14 recognized, this case is not *Harvard*. I'm referring, of
15 course, to Footnote 4 of the *Harvard* decision.

16 So when plaintiff argues that the military needs to
17 quantify how much diversity improves cohesion, retention,
18 legitimacy that the Naval Academy needs to quantify how many
19 students are affected by its consideration of race, when
20 plaintiff argues that the Naval Academy and DoD need to put
21 forward statistical modeling or we lose, that is based on zero
22 law. And, remarkably, I did not see or hear about a single
23 military case in their closing argument just now.

24 It is extremely significant that plaintiff does not
25 identify a single case involving military judgments with the

1 quantification or statistical modeling requirement that they
2 are trying to impose.

3 Just as a few examples:

4 United States v. *Playboy*, which we saw in their slides
5 earlier this morning, was a speech restriction on cable
6 networks.

7 *Republican Party of Minnesota v. White*, also in their
8 slides this morning, was a speech restriction on candidates
9 running for judicial election.

10 The *Hayes* decision from the Fourth Circuit, also in their
11 slides this morning, was a race-based promotion policy for
12 police and even then did not require quantification or
13 statistical modeling.

14 By contrast, the military cases have no such requirement.
15 In fact, they reject such a requirement.

16 Let's take *Goldman* as an example, which was a religious
17 discrimination challenge to a military dress requirement.

18 In *Goldman*, there was no discussion of requiring the
19 military to quantify how much more unity and mission success
20 would be achieved through standardized uniforms. There was no
21 requirement that the military quantify the effect of uniforms
22 on good order and discipline. In fact, the plaintiff in that
23 case has specifically argued that the military's judgment
24 lacked actual experience or scientific study and the Supreme
25 Court expressly rejected that argument.

1 Similarly, Holder involved executive branch efforts to
2 combat terrorism. The plaintiffs in that case demanded hard
3 proof with specific facts and specific evidence that their
4 activities would support terrorist attacks. But the Supreme
5 Court said that would be a dangerous requirement. That in the
6 context of foreign affairs and national security, conclusions
7 must often be based on informed judgment.

8 Of course here, the military both has actual experience
9 from the days when its officer corps were not diverse as well
10 as scientific studies showing the effect of diversity climates
11 on retention and imperial analysis on diversity and battlefield
12 performance and others. So that, alone, takes care of
13 plaintiff's argument as a factual matter.

14 But to the fundamental legal point, the Supreme Court has
15 repeatedly made clear that the military context is different.
16 Plaintiff's exclusive reliance on nonmilitary cases applies the
17 wrong legal framework. And plaintiff's very surprising
18 refusing to grapple with any authorities in the military
19 context portrays the weakness of their position.

20 Undersecretary Vazirani explained earlier this week that
21 the military is not willing to play around with the dangerous
22 experiment of risking lives and missions to test plaintiff's
23 hypothesis that diversity doesn't matter. The military, backed
24 by Congress, has made the judgment that it will not accept the
25 avoidable risk that comes with the lack of diversity. That

1 judgment is what matters.

2 So let's move on to narrow tailoring. The narrow
3 tailoring inquiry must, itself, be tailored to the relative
4 context. We know this from *Grutter*. We also know this from
5 *Parents Involved* case, which plaintiffs discussed this morning.

6 Notably, the Supreme Court stressed that the *Parents*
7 *Involved* case arose in the context of elementary schools, not
8 your unique context of higher education, as presented in
9 *Grutter*, and certainly the unique context of military
10 preparation as presented here. We even know this from Harvard,
11 which discussed different contexts such as the prison context.
12 So we can't mechanistically apply *Parents Involved*, Harvard, or
13 even *Grutter*.

14 As I mentioned, though, from the very beginning of this
15 case plaintiff has tried to fit this case within the *Harvard*
16 box. They argued at the preliminary injunction stage that
17 *Harvard* is dispositive. During trial, they put on the same
18 arguments they made in *Harvard*; and they brought in the same
19 experts they used in *Harvard*, but the military context here is
20 unique. There are aspects of *Harvard*, *Parents Involved*, and
21 even *Grutter* that simply do not fit in this context.

22 I've already talked about one of those poor fits, which is
23 the idea that the Naval Academy and DoD need to quantify the
24 interest through numbers or statistical modeling. Again, that
25 requirement is made up. It is not in any of the Supreme Court

1 jurisprudence concerning military judgment.

2 Another forfeit is the notion of an end date. No court
3 has ever held that national security has an end date. Why?
4 Because national security presents enduring, unpredictable risk
5 that requires ongoing mitigation.

6 Undersecretary Vazirani told the Court that from DoD's
7 perspective, they're also pursuing improvement and mitigating
8 risk. They're always looking to be more effective, more
9 efficient. We should hope our military is doing that.

10 But, in any case, the Court has seen documents and heard
11 testimony establishing that the Naval Academy intends to stop
12 considering race when it can achieve and maintain a brigade
13 that reflects the United States population.

14 Plaintiff has tried to cast doubt on this in three ways.
15 Again, none of this even matters if the Court includes, as we
16 think it should, that there is no end date to national
17 security. But I'll go through them in case the Court thinks
18 end dates might be relevant.

19 First, the plaintiff says the Naval Academy has just made
20 up its end date. We can put that to rest with the many
21 documents in evidence in this case showing that it has long
22 been the military's goal to reflect the population it serves.
23 Here are a couple of examples on Slide 15.

24 In the upper right-hand corner is DX137, which is the
25 Department of Defense's 2012 strategic plan. On the upper

1 right is DX177, which is the Secretary of Defense's memo from
2 2020. On the bottom here are P805 and P806 which
3 Mr. Strawbridge showed to the dean during his testimony, which
4 come from Naval Academy's recent institutional assessment
5 reports.

6 And, of course, early we also saw the Military Leadership
7 Diversity Commission report making the same point, that was
8 P445.

9 Plaintiff's next argument is that the Naval Academy is
10 already there with Asian representation. The Naval Academy has
11 indeed made progress with Asian representation. That is a good
12 thing. But the Naval Academy does not have confidence it can
13 maintain those numbers at this time without considering race to
14 some extent.

15 Dean Latta testified that he knows this based on his
16 experience in every admissions cycle for over 20 years, seeing
17 the applications that come in as a result of race-neutral
18 alternatives and knowing that they cannot get to where they
19 want to be without something more.

20 Plaintiff has not identified any evidence challenging that
21 experience.

22 And, more broadly, yesterday Ms. Miller walked us through
23 the data showing that Asian representation at the O6 level as
24 well as at the flag and general officer levels is not
25 reflective of the general population. That testimony also is

1 unrebutted and unchallenged. So there has absolutely been
2 progress. We just aren't there yet.

3 Finally, on the issue of end date, plaintiff says the
4 numbers of the Naval Academy are actually closer to the general
5 population than they appear because multiracial individuals
6 should not be their own category.

7 What we've heard them and their witnesses during trial say
8 is, if you don't put people who are part Black in the Black
9 box, for example, then President Obama and Vice President
10 Harris aren't Black.

11 But of course we know that biracial and multiracial
12 individuals exist in today's America. As we see here in the
13 U.S. Census on Slide 17, they are reported as a separate
14 category.

15 Does that mean that an individual who identifies -- who
16 has Jamaican and Indian descent doesn't consider herself Black
17 or Asian as well? Of course not. It just means that in terms
18 of understanding the composition of today's society, the U.S.
19 Census shows her as multiracial. And so would the Naval
20 Academy. Why? Because the Naval Academy, like all federal
21 institutions, is required to report race the way that the
22 Census and the Office of Management and Budget report it, as
23 Your Honor sees here on Slide 18 and as Ms. Miller testified
24 yesterday.

25 Plaintiff has made a big deal, including this morning,

1 about informal updates to the superintendent that do not have
2 the multiracial category. But Dean Latta testified that the
3 superintendent is well aware that multiracial midshipmen exist.
4 That testimony is unrebuted and unchallenged.

5 And plaintiff also concedes that the Naval Academy does
6 indeed report using the multiracial category.

7 Mr. Strawbridge showed an example of that just earlier
8 today in this slide. And here's another example on the right
9 of Slide 18 of our presentation. This is P520, the Naval
10 Academy's most recent class snapshot. As Your Honor can see,
11 the Naval Academy follows the U.S. Census and the OMB standard
12 for reporting multiracial individuals.

13 I just talked about some ways in which the Supreme Court's
14 decisions in *Grutter*, *Fisher*, and others can't be ported over
15 into the military context, but there is some guidance that we
16 can apply here.

17 Your Honor will recall this slide from our opening
18 statement. So first, *Fisher* says institutions cannot have
19 racial quotas or award points for race.

20 A quota, in the words of the Supreme Court, is: Where a
21 fixed number of seats are reserved exclusively for minorities.
22 It's a fixed number or a fixed percentage which must be
23 attained or which cannot be exceeded.

24 The evidence presented at trial unequivocally has shown
25 that there are no racial quotas at the Naval Academy. The

1 documents and testimony also are crystal clear that race may
2 not be the basis for points.

3 This evidence also takes care of plaintiff's citation to
4 the *Alexander* case from the Fourth Circuit, which I believe
5 they discussed this morning. That was the case that set caps
6 for the number of White people seeking employment from the
7 county. That is obviously not what the Naval Academy has done
8 here with admissions.

9 A related concept to the quota is that institutions cannot
10 engage in racial balancing. We've shown that the Naval Academy
11 does not racially balance.

12 The Court saw evidence that the numbers from each minority
13 group fluctuate from one year to the next. The plaintiff says
14 well, the similarity in percentages of minority groups year
15 over year shows racial balancing.

16 This is the table that we saw in their opening statement,
17 and again just now in closing, which put *Harvard*'s numbers next
18 to the Naval Academy's numbers. They say, the Supreme Court in
19 *Harvard* found this to be racial balancing and therefore it's
20 racial balancing here. But that's not quite right for at least
21 two reasons.

22 In the *Harvard* decision, Your Honor will see that the
23 Supreme Court immediately, before this table, talked about the
24 specific evidence in *Harvard* that their admissions committee
25 would track the numbers in order to make admissions decisions.

1 And, that the *Harvard* numbers, in fact, reflected the college's
2 goals for each respective minority group.

3 Here, the Naval Academy's numbers don't reflect its goals.
4 We've heard a lot of testimony about how the Academy would like
5 these numbers to be higher. It just doesn't have the applicant
6 pool to get there at this time. That is a critical difference.

7 And it's a critical difference from the *Eisenberg* case
8 that plaintiffs cited in their closing just now. That was a
9 case involving a school transfer policy that was administered
10 to maintain a specific percentage of racial balance in each
11 school.

12 Again, the Naval Academy actually is not looking to
13 maintain the numbers here on the right. They're looking to
14 increase them. They just can't at this time with their
15 applicant pool.

16 Remember *Grutter* as well, which said some attention to
17 numbers without more is not a problem; but with more could be a
18 problem. And there is no evidence of that more here.

19 On the contrary, Dean Latta testified that admissions
20 decisions are not made based off of documents like P18 or P558.

21 In fact, in P558, which is shown here on Slide 22, you can
22 see that there is significant variability in the offers that
23 are made within the minority groups. For the class of 2025,
24 for example, 235 minorities have received offers as of
25 March 15, whereas, the number was 378 for the class of 2026.

1 That is a 60 percent differential.

2 Same with P18 on the left, which I believe the Court may
3 have been shown this morning or a similar document. The number
4 in this version shows the number of minorities fluctuating from
5 449 to 563, that is a 25 percent differential. It's hard to
6 see how this shows racial balancing. And it's hard to see how
7 plaintiff can conclude that the Naval Academy is making
8 admissions decisions off these documents, especially when they
9 haven't put on any evidence to challenge or rebut Dean Latta's
10 testimony.

11 So back to the opening slide which is Slide 23 here.
12 *Grutter* and *Fisher* say institutions cannot use race in
13 isolation. We've demonstrated that the Naval Academy
14 absolutely does not use race in isolation.

15 The Court heard extensive testimony that when race is
16 consider, it is part of a highly-individualized, holistic
17 review that looks at everything in the candidate's file.

18 Ms. Hwang even showed the Court some of the key portions
19 of the application where the Naval Academy is looking at all
20 the information submitted. As a reminder, that sample
21 application was DX145.

22 *Grutter* says institutions cannot use racial stereotypes.
23 Again, the Court has heard witness after witness testify that
24 the Naval Academy and the Department of Defense, more
25 generally, absolutely are not making any type of assumptions

1 that a particular minority is going to bring a particular
2 experience or a particular viewpoint. Plaintiff has put on no
3 evidence to the contrary.

4 Now, I know the Court observed last week it was hearing a
5 lot of testimony where race is not used in the process. Your
6 Honor, that's because we thought it was important to
7 demonstrate how narrowly tailored the consideration of race is.

8 So the final two points on this slide are here to help the
9 Court understand how narrow the circumstances are where race
10 can be considered.

11 As the Supreme Court said in *Fisher*, the fact that race
12 plays a role in only a small portion of admission decisions
13 should be a hallmark of narrow tailoring, not evidence of
14 unconstitutionality.

15 So the Court heard a lot of testimony about all of the
16 appointments where race cannot be considered. For example, on
17 congressional slates using the principal method where the
18 principal nominee is fully qualified. As a reminder,
19 congressional nominations are a unique feature of the Academies
20 and statutorily required. Congressional vacancies make up more
21 than half the class and principal methods account for
22 approximately 35 percent of congressional nominations.

23 Another example is with qualified alternatives who must be
24 offered based on their whole-person multiple score only.
25 Again, as a remainder, the evidence is unequivocal that race is

1 not a factor in the whole-person multiple score. That is in
2 P25 and DX1.

3 The Court also received a lot of evidence about how race
4 is not considered in determining whether a candidate is
5 qualified or not qualified. Dean Latta and Ms. Hwang both
6 testified to that.

7 As shown here in the next slide, they said that race could
8 be among the factors considered for a letter of assurance or a
9 recommendation that a candidate go to prep school but not for
10 deciding whether someone is qualified or not qualified.

11 Plaintiff in their closing this morning made a big deal
12 about Ms. Hwang answering a very generic question about the
13 holistic review done by the admissions board. They
14 conspicuously avoided breaking down the three tasks performed
15 by the board because, when you ask the more specific question,
16 Ms. Hwang explained just what I said, that race can be
17 considered for an LOA or for prep school but not for deciding
18 qualified/not qualified. She said that's been the training for
19 as long as the 10 years that she has been there.

20 Your Honor will also notice that plaintiff didn't bother
21 to ask Dean Latta the question, even though he's in charge of
22 the whole process and is part of the admissions board. But he,
23 too, affirmed that race is not considered for qualified/not
24 qualified. That's shown here on the right of Slide 24.

25 Captain Birch who served on the admissions board and has

1 gotten the training that plaintiffs spent a lot of time on
2 today said the same thing. And here, I need to highlight one
3 thing in particular.

4 During their closing just now, Mr. Strawbridge said that
5 Captain Birch admitted race is used among the factors in
6 qualification. I don't need to remind the Court that plaintiff
7 was previously admonished for that mischaracterization of
8 Captain Birch's testimony. Captain Birch said, five or six
9 separate times, that race could be a subset of factors such as
10 unique life experience or adversity.

11 I've put some of that testimony up here on Slide 25. What
12 does that mean? It means that race might be something that
13 affected someone having a particular life experience or someone
14 might have experienced diversity related to their race such as
15 racial discrimination. That means the Naval Academy is
16 considering whether someone had a unique life experience or
17 overcame adversity. That is not the same thing as considering
18 race whether as one factor or among many.

19 In fact, it's in line with Chief Justice Roberts'
20 concluding words in *Harvard*: "Nothing in this opinion should
21 be construed as prohibiting universities from considering an
22 applicant's discussion of how race affected his or her life, be
23 it through discrimination, inspiration, or otherwise."

24 According to the Supreme Court, considering experiences
25 affected by race is not the same thing as considering race.

1 Let's look at one more slide from the opening statements.
2 This one is from plaintiff's opening and it's Slide 27 of my
3 presentation here. This is what they said they would prove
4 with respect to the consideration of race. But plaintiff
5 hasn't put on any evidence, whatsoever, that the whole-person
6 multiple score or the RAB adjustments to the score use race.
7 We have put on evidence that they don't.

8 They've offered some cherry-picked sound bytes on
9 qualification, but as I just showed the Court, the full record
10 makes clear that race is not used for deciding whether someone
11 is qualified or not qualified. And plaintiffs certainly hasn't
12 identified a single candidate where their race was taken into
13 account for qualification.

14 Next, qualified alternates. Your Honor will recall that
15 plaintiff did not ask Dean Latta or Ms. Hwang a single question
16 on qualified alternates. Why is that important? Because it
17 means they haven't proven that the Naval Academy uses race for
18 qualified alternates. To the contrary, the testimony we
19 elicited established that the Naval Academy offers qualified
20 alternate appointments solely based on whole-person multiple
21 score.

22 Superintendent nominations. The Naval Academy has
23 acknowledged from the very beginning of this case that race
24 theoretically can be among the factors considered for a
25 superintendent nomination. Plaintiff latches onto that

1 theoretical possibility and says the Naval Academy admits that
2 race is used. That is wrong. Dean Latta testified that for at
3 least the last 15 years race has not been a factor for
4 superintendent nominations. That testimony is unrebutted and
5 unchallenged.

6 The rest of this chart shows what the Naval Academy has
7 said all along, that race can be among the factors considered
8 for a letter of assurance and additional appointees, and with
9 respect to the remainder, that race can be among the factors
10 considered when filling congressional slates that used the
11 competitive method.

12 Plaintiff's next challenge on narrow tailoring is that the
13 Naval Academy's consideration of race doesn't actually serve
14 the asserted military interest. I'll break this argument down
15 into three pieces and address them in turn.

16 First, plaintiff argues that because other accession
17 sources produce numerically more officers, the Naval Academy
18 has low leverage to affect the composition of the overall
19 corps. This is the Boston Consulting Group document they
20 repeatedly used during trial and that we saw again this
21 morning.

22 But as Undersecretary Vazirani, Ms. Miller, and Dean Latta
23 testified, that relatively smaller number from the Naval
24 Academy has outsized impact.

25 The Court is familiar with these numbers by now:

1 40 percent of flag officers in the Navy are Naval Academy
2 graduates and about 90 percent of chiefs of naval operations
3 have come from the Naval Academy.

4 Yesterday, Ms. Miller added that eight of the 12 aircraft
5 carriers in the Naval Academy today, which is about 67 percent,
6 are commanded by Naval Academy graduates.

7 Saying the Naval Academy has low leverage to effect the
8 officer corps is just not the way that the Naval Academy or the
9 Navy or the Department of Defense look at this issue.

10 The progress of the senior ranks is slow, no doubt. That
11 is a function of the military's grow-your-own system. But,
12 unquestionably, there has been meaningful progress as Admiral
13 Fuller and Ms. Miller emphasized this week.

14 Your Honor looked at DX204 with Ms. Miller yesterday where
15 she pointed out the progress of the O6 rank. I put that up
16 here again on Slide 30.

17 Asian representation has gone from zero percent in 2001 to
18 2.9 percent in 2023. Black representation has gone from
19 4.2 percent in 2001 to 5.9 percent in 2023. Hispanic
20 representation has gone from 1.4 percent to 5.4 percent in 2023.
21 This is meaningful progress.

22 And speaking more generally across the corps, the Naval
23 Academy is undisputedly making a difference on the composition
24 of overall officers as we see here on Slide 31.

25 Minority representation in the officers commissioning from

1 the Naval Academy is on a steady upward climb as you can see on
2 the left. So what this means is that as soon as graduates
3 commission as ensigns and second lieutenants, they are
4 diversifying the officer corps from day one. And at the
5 15-year mark, which is on the right, minority graduates from
6 the Naval Academy are retaining at rates higher than their
7 white counterparts. These numbers will only continue to grow.

8 As the Court has heard, it takes time for the military to
9 grow its own. Today's flag officers, today's Admiral Fuller's
10 are the results of accession decisions 20, 30 years ago.
11 Twenty to 30 years from now, we'll see the results of today's
12 diverse Naval Academy graduates at the senior ranks.

13 So it's simply not correct to say that the Naval Academy's
14 increasingly diverse classes are having little to no affect on
15 the Navy.

16 And according to the Supreme Court in *Fisher*, even a
17 limited effect can still be meaningful.

18 Plaintiff's next argument, which came up during trial but
19 not so much explored today during closing, is that minorities
20 graduate from the Naval Academy at a lower rates than White
21 students and, therefore, the Naval Academy's consideration of
22 race in admissions isn't actually resulting in minority
23 officers, and plaintiff during trial took particular aim at
24 African Americans and Hispanics.

25 Just as an initial matter, we can obviously see from these

1 charts on Slide 32 that the Naval Academy is producing minority
2 officers, including Black and Hispanic officers. And as
3 Captain Vahsen, who is the execute director of strategy
4 explained, the relative sizes of each of these groups makes a
5 big difference.

6 For example, if you have 70 Black midshipmen and 10 that
7 say they don't want to stay, the graduation percentage for that
8 group is going to look a lot different than if you have 700
9 White midshipmen and 10 who decide they don't want to stay.

10 And let's also just take a moment to dispel any suggestion
11 that Black midshipmen are flunking out. Captain Vahsen was
12 crystal clear that academic attrition is one of the least
13 common types of attrition. The most common type is voluntary
14 attrition. And African Americans are on the lower end of all
15 races and ethnicities for that attrition type. That testimony
16 is here on the bottom of the slide.

17 Plaintiff's final argument on this issue in which they
18 touched on briefly this morning seems to be that DoD could more
19 directly address the issue of low diversity, particularly in
20 the senior ranks, by considering race in promotions and
21 ordering service members into communities like the SEALS, the
22 submarine force, and aviation.

23 There are any number of problems with this argument, as
24 the Court heard most recently from Ms. Miller yesterday. The
25 whole point of the Naval Academy considering race in the

1 admission is so it can broaden the pool of highly-diverse,
2 highly-qualified officers commissioning as ensigns and second
3 lieutenants. Plaintiff's proposal doesn't do that.

4 A related problem is that moving minority officers from
5 one community to another, again, isn't diversifying the corps.
6 You're just making one community less diverse.

7 Yet another problem is all of these communities have very
8 specific training and qualification requirements. There's very
9 little opportunity to take an officer who trained as a surface
10 warfare officer and turn them into a submariner.

11 Another problem is the Navy does its best to assign people
12 to the communities that they want to be in. As Your Honor has
13 noted, and I believe Ms. Miller and Captain Sundberg testified
14 yesterday, choice by a service member very much factors into
15 the communities they enter. And it matters because, as
16 Ms. Miller explained, forcing people into communities they
17 don't want to be in will result in more people leaving.

18 Undersecretary Vazirani and Ms. Miller explained these
19 issues far better than I can, but I'll sum it up this way: The
20 military is the one to make judgments about how best to run the
21 military, not plaintiff.

22 Let's turn to race-neutral alternatives. We'll start with
23 some legal framing here on Slide 34, and as we can see here,
24 narrow tailoring requires good faith consideration of workable,
25 race-neutral alternatives. Keywords are "good faith" and

1 "workable."

2 Narrow tailoring does not require exhaustion of every
3 conceivable.

4 Narrow tailoring does not require an institution to
5 sacrifice all of the other forms of diversity or
6 characteristics they're looking for.

7 Under these principles, the Naval Academy has employed all
8 workable race-neutral alternatives available to them but cannot
9 get to where it needs to be with only those alternatives.

10 Again, the Naval Academy wants to reflect the United
11 States population. Even now, when considering race, the Naval
12 Academy isn't there.

13 By the way, that only further shows that the Naval Academy
14 is not lowering its standards. If they were, they could bring
15 in a whole lot more minority students but they're not willing
16 to because they need to produce highly-qualified officers. And
17 the Supreme Court in *Grutter* says, "Of course, it's not a
18 race-neutral alternative to sacrifice excellence."

19 But back to the basic point. If the Naval Academy today
20 isn't where it wants to be and it's considering race, it
21 follows that taking away their ability to consider race is not
22 going to help them get closer to their goal. Ms. Miller
23 highlighted that obvious point yesterday.

24 In fact, if the Court looks at the modeling done by
25 plaintiff's own expert here on Slide 35, their expert,

1 Dr. Arcidiacono, concludes that taking away the so-called
2 racial preference leads to a substantial decrease in
3 representation across every single minority group.

4 Now, there are a lot of issues with Dr. Arcidiacono's
5 model, as Mr. Gardner drew out in his cross examination.

6 For example, Dr. Arcidiacono admitted at trial that his
7 estimates are biased and that he doesn't actually model what
8 would happen in a world where the Naval Academy did not
9 consider race.

10 And he acknowledged that when he presented the same kind
11 of analysis in *Harvard* and *UNC*, his opinions were rejected in
12 those cases. But I show this to make what should be an obvious
13 point, that taking away the ability to consider race is not
14 going to help the Naval Academy get to where it needs to be and
15 that's also what Dean Latta testified his experiences for more
16 than 20 admissions cycles have shown. Again, that testimony
17 and that experience is unrebutted and unchallenged.

18 So if we return to the legal principles here on Slide 36,
19 your Honor will recall that Dean Latta testified for at least
20 an hour last week about all of the race-neutral alternatives
21 they use, both outside the admissions process and during the
22 process. The Court also saw a number of exhibits providing yet
23 more detail, a few of those can be found at DX28 and DX106.
24 Plaintiff's own race-neutral alternatives expert,
25 Mr. Kahlenberg, said the Naval Academy is doing good things.

1 His point was just that the Naval Academy should do more of
2 what they're already doing.

3 It should really go without saying, but the Naval Academy
4 is a federally-funded institution. It gets money from Congress
5 through the Navy, which has a lot of different places it needs
6 to allocate that Navy.

7 The Naval Academy itself has a lot of different places it
8 needs to allocate its money. Dean Latta explained, for
9 example, that the academic center gets most of the money
10 because, at bottom, the Academy is an institution that needs to
11 teach and train and prepare military officers. The admissions
12 office can't just get whatever money it wants. But what the
13 evidence at trial has shown is that admissions gets millions of
14 dollars every year, it invests millions of dollars in outreach
15 every year, and it spends its money strategically to achieve
16 the maximum impact.

17 A couple of final points on plaintiff's race-neutral
18 alternatives expert. Mr. Kahlenberg had a lot of ideas, but
19 ideas are not enough. That gets at the second legal principle
20 here on Slide 36.

21 Mr. Kahlenberg didn't actually do anything to show that
22 his ideas are feasible or workable for the Naval Academy given
23 the unique constraints that limit the Academy's applicant pool.
24 That goes to the first principle on this slide.

25 In fact, Mr. Kahlenberg admitted at trial, last week, that

1 many of his ideas are not expressly -- expressly not workable
2 for the Naval Academy. Things like removing preferences for
3 candidates coming from military families; dismiss those
4 participating in every sport except football and basketball;
5 those who have taken rigorous coursework. Overhauling the prep
6 program. Lobbying Congress.

7 Mr. Kahlenberg also admitted that none of his ideas
8 account for the broader characteristics that the Naval Academy
9 is looking for: Things like leadership, moral character, STEM
10 interest, geographic diversity, gender diversity. That gets at
11 a third principle on the slide here. He also admitted that
12 none of his ideas measure against the Naval Academy's goal,
13 which is to reflect the United States population. That brings
14 us back to the first principle on this slide, it needs to be a
15 workable race-neutral alternative.

16 And Mr. Kahlenberg admitted that even when you measure
17 against what currently exists at the Naval Academy, his own
18 simulations don't get the Naval Academy there.

19 Slide 37 is from Mr. Kahlenberg's demonstrative PD4. This
20 is the simulation that applies the biggest, most aggressive
21 socioeconomic boost of 150 percent, and this is the first time
22 in Mr. Kahlenberg's demonstrative where he shows an increase in
23 minority representation relative to what currently exists. An
24 increase of a single percentage point. Even in this most
25 aggressive simulation, Asian representation falls, Black

1 representation falls, academic metrics fall. This is also the
2 last time you see an increase in minority representation in
3 Mr. Kahlenberg's demonstrative.

4 As shown here on Slide 38, every other chart in PD4 shows
5 minority representation decreasing relative to what currently
6 exists. By definition, these are not workable alternatives.

7 At the end of the day, the Naval Academy holds a unique
8 position in the unique military context. We have shown during
9 this trial that because the human dimension is central to war,
10 the military has a compelling interest in a diverse officer
11 corps. That is a judgment that has been reinforced over
12 decades by such leaders as Colin Powell and Mike Mullen, both
13 Chairmen of the Joint Chiefs, numerous secretaries of defense,
14 and specific to this case, Secretary of the Navy. All names
15 Your Honor heard on the very first day of trial.

16 The Naval Academy's limited consideration of race in
17 admissions unquestionably serves this national security
18 interest and is narrowly tailored.

19 Over the past 10 days, plaintiff has litigated this case
20 as if they were challenging the policies at *Harvard*. This case
21 is not *Harvard*. We request judgment for the defendants.

22 **THE COURT:** Thank you very much, Ms. Yang.

23 With that, I think this matter will conclude. And I will
24 be taking this matter under advisement. I think that as I
25 mentioned in response to Mr. Strawbridge when we started this

1 morning, I just want to reiterate my compliments on the
2 representations here and the closing arguments have more than
3 met that standard. This has been an outstanding work on both
4 sides in this case.

5 And in these polarized times, I think the public should
6 take great comfort in watching the skill of excellent lawyers
7 in a civil fashion debating a very important issue and it's
8 been really extraordinary. I consider it a privilege to
9 preside over this trial. And I think the lawyering I've seen
10 is top of the charts from my 21 years on the bench. And I mean
11 that sincerely as to all of you. That applies not only to the
12 lead lawyers, and those that had a more prominent role, but to
13 the younger lawyers.

14 As the younger lawyers go through their careers, you're
15 going to find that this may be a highlight for your careers, in
16 terms of having the opportunity to be part of this case, and
17 you all have lived up to it, and you all should be very proud
18 of what you've done here. And I'm enormously impressed by the
19 quality of the litigation of this case.

20 And to the extent that I had -- I think Mr. Strawbridge
21 said I put you on the grindstone, I felt very strongly that
22 this case was literally filed a year ago in this court on
23 October the 5th last year and it'll be a year next week. And I
24 felt very strongly that there's no reason why we can't put this
25 case on track and we have and it's because of the hard work of

1 the lawyers. And I want to sincerely thank all of you.

2 I mean it sincerely when I say it's been a privilege to
3 preside over this case and now the bowling ball is in my lap.
4 And I will do my very best, very best to render an opinion in
5 this matter within the next six weeks to seven weeks. I
6 promise you this is not going to drift into next year for an
7 opinion by me. I will make every effort to get an opinion
8 within the next six to seven weeks.

9 So with that, I think this concludes this matter and this
10 case stands adjourned. Thank you all very much.

11 **THE CLERK:** All rise. This Honorable Court if now
12 adjourned.

13 (Court adjourned at 11:53 a.m.)

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1 CERTIFICATE OF OFFICIAL REPORTER
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I, Ronda J. Thomas, Registered Merit Reporter, Certified
Realtime Reporter, in and for the United States District Court
for the District of Maryland, do hereby certify, pursuant to 28
U.S.C. § 753, that the foregoing is a true and correct
transcript of the stenographically-reported proceedings held in
the above-entitled matter and the transcript page format is in
conformance with the regulations of the Judicial Conference of
the United States.

Dated this 26th day of September 2024.

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15 Ronda J. Thomas

16 Ronda J. Thomas, RMR, CRR
17 Federal Official Reporter
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